Supreme Court, U.S.
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No. 02-1199

IN THE

Supreme Court of the United States

DARREL D. SMITH,

Petitioner,

v.

TOM GRIMMETT, JOHN PETER LEE, LTD., NANCY L. ALLF, EDWARDS & HALE, LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT JOHN PETER LEE, LTD.

PAUL C. RAY
Counsel of Record
JOHN PETER LEE, LTD.
830 Las Vegas Boulevard South
Las Vegas, Nevada 89101
(702) 382-4044

Counsel for Respondent John Peter Lee, Ltd.

180231

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Respondent, John Peter Lee, Ltd., has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

Statement Pursuant to Rule 29.6 i

Table of Contents ii

Table of Cited Authorities iv

Statement of the Case 1

I. The Appellate Courts Have Repeatedly Affirmed The Rulings Adverse To Smith, Finding Him To Be Judicially Estopped And Affirming Numerous Fee Awards Against Smith For His Frivolous Litigation. 2

II. Bankruptcy Judge Jones Said That His Intent Was To Be Open Minded And That The Evidence He Heard On Remand Reconfirmed His Impression After Applying The Standards Mandated By The Appellate Court. 4

III. Judge Jones Correctly Explained That The Nature Of Bankruptcy Is That Many Related Proceedings Can Come Up In The Same Case Not Necessarily Invoking The Extra-Judicial Source Rule Discussed In This Court's *Liteky* Opinion. 5

Contents

	Page
Reasons for Denying the Writ	6
I. The Lower Courts Correctly Denied Smith's Motion For Disqualification.	6
II. The Courts Of Appeals Are Not In Conflict With The Decision Below.	7
III. Smith Misrepresents The Importance Of The Issues He Identifies.	9
Conclusion	10
Appendix	1a

TABLE OF CITED AUTHORITIES

Page

Cases:

Frates v. Weinshienk, 882 F.2d 1502 (10th Cir. 1989) 7, 8, 9

In Re Joint E & S District Asbestos Litigation, 737 F. Supp. 735 (E.& S.N.Y. 1990) 9

Liteky v. United States, 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994) 5, 6, 7, 9

TABLE OF CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS

The following related appeals originated from *In Re: Darrel D. Smith*, United States Bankruptcy Court, District of Nevada, Case Number 91-21026-RCJ:

Supreme Court of the United States:

Darrel D. Smith, Petitioner
v.
John Peter Lee, Ltd.; Tom Grimmitt,
Chapter 7 Trustee, Respondents
Case No. 98-542

Cited Authorities

***Court of Appeals for the Ninth Circuit*:**

Darrel D. Smith, Appellant
v.
John Peter Lee, Ltd. Appellee
CV-S-98-01615-HDM(LRL)

Darrel D. Smith, Appellant
v.
Edwards & Hale, Ltd., Appellee
CV-S-99-01761-HDM, BAP 99-1727

9th Cir. 96-15214, CV-S-96-133, BAP 96-1154

CV-S-99-1114, BAP 99-1517

CV-S-97-584-HDM (RLH)

9th Cir. 00-17274, CV-S-98-1615, BAP 98-1721 / CV- S-99-1515, BAP 99-1679 9th Cir. 96-17214, CV-S-96-00133-PMD (RLH)

In Re Smith, 305 F.3d 1078 (9th Cir. 2002), Nos. 00-17260, 00-17274 and 01-16531

***United States District Court District of Nevada*:**

CV-S-92-726, BAP 92-1805

CV-S-92-728, BAP 92-1806

Cited Authorities

CV-S-92-725, BAP 92-1838

CV-S-92-726

CV-S-92-727

CV-S-92-728

CV-S-93-409

CV-S-93-471

CV-S-94-827, BAP 94-2079

CV-S-95-243, BAP 95-1170

CV-S-96-949-LDG (LRL), BAP 96-1850

CV-S-97-27-LDG (LRL)

CV-S-97-28-LDG (LRL), BAP 96-2114

CV-S-97-149-LDG (RLH), BAP 96-2162

CV-S-97-872-LDG (RLH)

CV-S-97-1054

CV-S-97-2104, BAP NV-97-1849

Cited Authorities

CV-S-98-90

CV-S-99-232-PMP (RLH)

CV-S-99-438-DWH (RLH)

CV-S-99-887

CV-S-99-897

CV-S-99-1145-DWH (PAL)

CV-S-99-1515

CV-S-99-1581-DWH (RLH), BAP 99-1707

CV-S-99-2159

CV-S-99-2169

CV-S-00-922, BAP 99-1378

STATEMENT OF THE CASE

Respondent, John Peter Lee, Ltd. objects to Smith's statement of the relevant facts. Smith filed his Voluntary Petition under Chapter 11 of the Bankruptcy Code on March 22, 1991. At the time of the filing of the Petition, the case was assigned to the Honorable Robert Clive Jones. Smith hired the law firm of John Peter Lee, Ltd. to represent him with regard to the bankruptcy, as well as associated litigation that was proposed as a source of funding for Mr. Smith's reorganization plan.

The bases of the litigation were numerous causes of action asserted by Smith to pursue a community property right in the Tropicana Hotel & Casino in Las Vegas, Nevada, which was owned at the time by his then wife, Mitzi Briggs. This litigation was resolved through a global settlement negotiated between Smith and Edward Doumani directly, without the assistance of counsel. The Settlement Agreement became a point of contention when Doumani drafted an Addendum to the Agreement which was not voluntarily signed by Smith.

Judge Jones, in 1992, ruled without the submission of evidence that the Addendum was part of the Settlement Agreement and that any community property right that was asserted through the language of the Agreement would have to be determined by the state courts of Nevada. In July 1994, after the District Court remanded the Settlement Agreement issue back to Judge Jones ordering an evidentiary hearing, Judge Jones listened again to the same arguments, received evidence, and restated his previous order.

I. The Appellate Courts Have Repeatedly Affirmed The Rulings Adverse To Smith, Finding Him To Be Judicially Estopped And Affirming Numerous Fee Awards Against Smith For His Frivolous Litigation.

Judge Jones specifically added in his Findings of Fact and Conclusions of Law on September 7, 1994, the following conclusion of law, paragraph number 4:

> Smith is judicially estopped from obtaining the interpretation of the Settlement Agreement that he and his counsel have sought, in that said interpretation is inconsistent and irreconcilable with the representation and arguments of record that were made and presented to this Court over the course of the several hearings that predate entry of the Order Enforcing Settlement Agreement.

Smith asserts that this ruling was made with bias and prejudice against him. The same factual statements were presented by Smith at the evidentiary hearing as were presented at the non-evidentiary hearing. The Bankruptcy Court ruled that Smith was judicially estopped by his earlier statements. This ruling and the order imposing sanctions against Smith were never reversed. Smith's challenge of this ruling is now barred by the principle of res judicata.

Smith knew or should have known at this time that Judge Jones, in rendering the identical ruling as in the non-evidentiary hearing, made his ruling using judgments and evaluations developed in the prior hearing. Smith should have moved for recusal at that time rather than waiting seven years and receiving numerous rulings on over thirty appeals and other hearings. (*See* Table of Citations of the Official and Unofficial Reports of the Opinions and Orders entered in the case by the court.)

Smith now, after ten years of bankruptcy proceedings, asks this court to disqualify Judge Jones and overturn a decade of rulings made by all levels of the court system.

Prior to the recusal hearing on June 29, 1999, Judge Jones had addressed Smith's oppositions to more than ten separate fee applications by his attorneys for fees incurred on Smith's behalf. Smith filed a motion for recusal which was heard on June 29, 1999. The bankruptcy court found that each of these issues had been addressed in the actions of the attorneys and had been reviewed by the bankruptcy court in Smith's oppositions to attorney fee applications, Smith's objection to claims and his appeals that were taken and resolved against Smith.

In addressing Mr. Smith's allegations that recusal was appropriate in this action in 1999, Judge Jones specified that the only resolved opinion in 1991 was to have the state court decide the community property issues. Judge Jones also stated that, since that time, he found Smith's litigation and allegations to be frivolous and excessive against the law firm of John Peter Lee, Ltd., who had represented the Debtor prior to the conversion of the Chapter 11 Bankruptcy case into a Chapter 7 liquidation. Judge Jones stated at one of the fee hearings on August 31, 1999:

> I expressly agree with the factual assertions set forth in John Peter Lee's brief. . . . And I express in the strongest possible language, to the appellate court and to others, that this really has reached a frivolous, frivolous stage.

(Transcript, p. 2a.) All the fee orders have been upheld and are now final. In the immediately preceding appeal below, the Ninth Circuit Court of Appeals also awarded fees to the only post-argument applicant for fees, which was Edwards & Hale, Ltd.

II. Bankruptcy Judge Jones Said That His Intent Was To Be Open Minded And That The Evidence He Heard On Remand Reconfirmed His Impression After Applying The Standards Mandated By The Appellate Court.

Contrary to Smith's argument, Judge Jones patiently and diligently listened with an open mind to the presentations by both parties, and stated as follows:

> If I clearly come to opinions early on in the argument or before the argument, then I respectfully try to cut argument off. But otherwise I am listening to argument, perchance - even if I'm partially converted by the - by the pleadings, perchance counsel will say something to convert me one way or the other otherwise than a ruling simply on the pleadings would produce.
>
> * * *
>
> . . . But I did have impressions received from the prior hearings, even prior to the evidentiary hearings, and hopefully, it's my hope that I kept an open mind based upon the legal standard they [the district court on appeal] gave me [on remand] and upon the evidence that I received in subsequent hearings.

Judge Jones made these statements which are contained in the Appendix of Smith's Petition at pages 45a and 52a. Judge Jones thereby explained that the procedure he followed was to keep an open mind even though he already had some impressions from the prior bankruptcy proceedings.

Judge Jones' ruling on remand regarding Smith's divorce settlement agreement is final, binding and not properly the subject of Smith's Petition. Smith only later challenged Judge Jones for bias after the ruling on Smith's settlement agreement was res judicata.

III. Judge Jones Correctly Explained That The Nature Of Bankruptcy Is That Many Related Proceedings Can Come Up In The Same Case Not Necessarily Invoking The Extra-Judicial Source Rule Discussed In This Court's *Liteky* Opinion.

Judge Jones explained his practical, common sense view of his responsibility as a bankruptcy Judge to preside over bankruptcy cases as well as adversary proceedings within those cases but not to recuse himself every time he has to rule in an adversary case which may include reference or consideration of events in the underlying bankruptcy case. The top of page 42a of Smith's Appendix, quotes Judge Jones as follows:

> I've got a lot of cases right now, for example, that involve numerous preference actions, separate adversary proceedings in the same case. And the parties must understand when they present a separate adversary proceeding that they take the same judge who has heard the same insolvency issues time and over again with the - with the same - with respect to the same debtor.

Plainly Judge Jones recognized his responsibility to preside over both administrative case matters and adversary proceedings. Smith takes Judge Jones' statements out of context when he argues Judge Jones to disregard the applicability of *Liteky v. United States*, 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994), discussed below.

Smith does not dispute that all of the bankruptcy rulings which he discusses in his Petition are finally adjudicated with no remaining appeals pending and that they are now res judicata. The only fact issue that Smith has preserved now through his more than thirty (30) appeals is the recent issue of Judge Jones' alleged bias.

Smith fails to indicate any substantive matters remaining to be adjudicated even if a different judge were to replace Judge Jones to administer the actual closing of Smith's case now that his appeal rights are exhausted for all of the substantive issues. Smith's dissatisfaction with the numerous bankruptcy court and appellate court rulings against him is not a valid basis for his request to disqualify Judge Jones.

REASONS FOR DENYING THE WRIT

I. THE LOWER COURTS CORRECTLY DENIED SMITH'S MOTION FOR DISQUALIFICATION.

Smith fails to establish bias and prejudice by Judge Jones. This Court stated in *Liteky*, *supra*:

> . . . opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.

Liteky, 510 U.S. at 555, 114 S. Ct. at 1157, 127 L. Ed. 2d at 491. Smith never met this standard.

The Honorable Johnnie B. Rawlinson, sitting below as a district court judge by designation, stated:

> Nothing in the record before this Court indicates that Judge Jones was incapable of rendering fair judgment due to "deep-seated favoritism or antagonism." Judge Jones' refusal to disqualify himself, therefore, was not an abuse of discretion.

(*See* Smith's Appendix, pp. 37a, 38a.) Smith presents nothing in the record to contradict this finding.

A disagreement over a judge's ruling or a concern about an order that has already been entered is not a basis of recusal. Such disagreement is appropriately handled through the appellate process. *Liteky*, 510 U.S. at 555, 114 S. Ct. at 1157, 127 L. Ed. 2d at 490-91. The Ninth Circuit Court of Appeals correctly affirmed the district court and the bankruptcy court's denial of Smith's recusal motion.

II. THE COURTS OF APPEALS ARE NOT IN CONFLICT WITH THE DECISION BELOW.

Smith incorrectly argues the Ninth Circuit Court of Appeals' decision below to conflict with the Tenth Circuit Court of Appeals' decision in *Frates v. Weinshienk*, 882 F.2d 1502 (10th Cir. 1989). In *Frates*, the Tenth Circuit Court of Appeals also affirmed the denial of a recusal motion of a bankruptcy judge, reasoning in pertinent part as follows:

> A bankruptcy judge may preside over both the administrative and adversarial portions of a bankruptcy case. See 28 U.S.C. § 157.

* * *

> We also must recognize that "familiarity with defendants and/or the facts of the case that arises from earlier participation in judicial proceedings is not sufficient to disqualify a judge from presiding at a later trial. *In Re Corrugated Container Anti-Trust Litigation*, 614 F.2d 958, 965 (5th Cir.) (footnote omitted), cert. denied, 449 U.S. 888, 101 S.Ct. 244, 66 L.Ed. 2d 114 (1980). In many ordinary litigation situations, judges make preliminary decisions on offers of evidence, or make decisions otherwise affecting the parties, that familiarize the judge with the facts in that case or in related cases in which the judge must rule.
>
> * * *
>
> . . . we have carefully reviewed the briefs and exhibits provided us, and we see nothing which convinces us that the bankruptcy judge appears to have prejudged issues involved in the *Frates* and *Rial* litigation or has placed himself in such a position that he will be forced to decide an issue in favor of Kaiser regardless of the evidence presented to him in that litigation.

Frates, 882 F.2d at 1504, 1506. Smith misstates the holding of *Frates* in suggesting it to support his argument that general bankruptcy information in the same case must not be used in evidentiary hearings.

Like the moving party in *Frates*, Smith fails to present sufficient evidence to meet his burden of showing Judge Jones' opinions to display "a deep seated favoritism or

antagonism." *In Re: Smith*, 305 F.3d at 1078, 1093 (9th Cir. 2002) (authored by Judge Cudahy, a visiting judge from the Seventh Circuit Court of Appeals), quoting *Liteky*, *supra*. The Ninth Circuit Court of Appeals follows *Liteky*.

Smith does not conflict with *Frates*, which also expressly affirmed denial of a recusal motion based upon a bankruptcy judge's prior involvement and familiarity with the party's earlier proceedings. No conflict exists among the circuit courts of appeals concerning the reasoning of the Ninth Circuit Court of Appeals and the courts below. Similarly, the decision below does not depart from the accepted or usual course of judicial proceedings.

Smith misstates the law to try to create a conflict among the circuits where none exists. The reasons for granting the petition for writ of certiorari are absent under Supreme Court Rule 10.

III. SMITH MISREPRESENTS THE IMPORTANCE OF THE ISSUES HE IDENTIFIES.

Smith incorrectly argues that this case requires recusal and vacation of orders, citing *In Re Joint E & S District Asbestos Litigation*, 737 F. Supp. 735, 742 (E.& S.N.Y. 1990). First, that opinion denied a motion for disqualification. Second, the case does not mandate vacating any orders. Third, Smith ignores the orders, decisions and opinions in his case which are now are res judicata.

The only issue Smith brings to this court is the disqualification of Judge Jones. Unless Smith seeks to overturn the last ten years of trial and appellate court decisions in his cases, he states no material effect his request

to disqualify Judge Jones would have on his case. (*See* Table of Citations of the Official and Unofficial Reports, *supra*.)

The substantive rulings of the case are res judicata. Smith cites no valid authority for his request that this Court overturn all the final and numerous appeals decided against Smith which are now final and binding upon him. Smith's adversary proceedings have concluded. It is a moot point whether Judge Jones presides over the final administration and closure of Smith's bankruptcy case.

CONCLUSION

John Peter Lee, Ltd. respectfully requests this Honorable Court to enter an order denying Smith's Petition for Writ of Certiorari.

Respectfully submitted,

PAUL C. RAY
Counsel of Record
JOHN PETER LEE, LTD.
830 Las Vegas Boulevard South
Las Vegas, Nevada 89101
(702) 382-4044

Counsel for Respondent
John Peter Lee, Ltd.

APPENDIX

APPENDIX

United States Bankruptcy
District of Nevada
Las Vegas, Nevada

Docket No. BK-S-91-21026-RCJ

Las Vegas, Nevada
August 31, 1999

In Re:

DARREL D. SMITH

Debtor

MOTION BY DEBTOR TO COMPEL JOHN PETER LEE, LTD. AND EDWARDS & HALE, LTD. TO DISGORGE ERRONEOUSLY PAID FEES

APPLICATION BY INTERESTED PARTY NANCY ALLF FOR COMPENSATION, $2,337.50 FEES, $166.24 EXPENSES, TOTAL $2,503.74; SUPPLEMENT OF $2337.50 FEES, $166.24 EXPENSES

JOHN PETER LEE, LTD.'S FOURTH APPLICATION FOR COMPENSATION, $57,732.50 FEES, $5,124.02 EXPENSES, TOTAL $62,856.52

APPLICATION BY EDWARDS HALE & HANSEN LTD FOR COMPENSATION FEES OF $16,529 AND COSTS OF $2,036.33, TOTAL $18,565.33

SEVENTH APPLICATION BY RICHARD McKNIGHT FOR COMPENSATION, $47,745 FEES, $3,692 EXPENSES, TOTAL $51,437

Appendix

THE HONORABLE CLIVE JONES PRESIDING
UNITED STATES BANKRUPTCY COURT JUDGE

* * *

I expressly agree with the factual assertions set forth in John Peter Lee's brief, Mr. Thomas's brief filed May 24th, pages 3 through 8. There are both factual and legal conclusions set forth there.

I have extensive memory of the case, of the long proceedings of the case.

* * *

And I express in the strongest possible language, to the appellate court and to others, that this really has reached a frivolous, frivolous stage.

* * * *